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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

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UNITED STATES OF AMERICA

Plaintiff,

v.

DOW CORNING CORPORATION

Defendant.

CIVIL ACTION NO.:

C- '91-0215 L-A

CONSENT DECREE

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter ("Complaint") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended (hereinafter "CERCLA").

B. The United States in its Complaint seeks:

1. reimbursement for monies already spent by EPA for response actions at the Howe Valley Landfill Site ("Site") in Howe Valley, Hardin County, Kentucky, together with accrued interest;

2. an injunction requiring Defendant to perform and fund studies and remedial work at the Site in conformity with the Record of Decision (as defined below) and the National Contingency Plan ("NCP"), 40 C.F.R. Part 300, as amended;

3. recovery of costs that will be incurred by EPA in connection with such studies and remedial work; and

4. such other relief as the Court finds appropriate.

C. In accordance with Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA officially notified the State of Kentucky on September 26, 1990 of negotiations with defendants regarding the implementation of the Remedial Design and Remedial Action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this settlement.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior on August 4, 1987 of negotiations with defendants regarding the release of hazardous substances that may have resulted in injury to the natural resources under its trusteeship, and EPA has encouraged the Trustees to participate in the negotiation of this Consent Decree.

E. The Defendant that has entered this Consent Decree ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the Complaint.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA included the Howe Valley Site for listing on the National Priorities List by publication in the Federal Register on July 22, 1987.

G. In response to a release or threat of a release of a hazardous substance at or from the Site, a Remedial Investigation and

Feasibility Study ("RI/FS") was commenced and completed for the Site pursuant to 40 C.F.R. § 300.68.

H. On July 24, 1990, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published a notice and brief analysis of the proposed plan for Remedial Action, made this plan available to the public, and provided opportunity for public comment.

I. The final plan for Remedial Action is embodied in a Record of Decision ("ROD"), executed on September 28, 1990, which was published and made available to the public in accordance with Section 117 of CERCLA. The State had a reasonable opportunity to review and comment on the ROD.

J. In accordance with Section 121(d)(1) of CERCLA, EPA and Settling Defendant (the "Parties") agree that the final plan for Remedial Action adopted by EPA and embodied herein will attain a degree of cleanup of Waste Materials, Hazardous Substances, Pollutants and Contaminants released at the Site and control of further releases which at a minimum assures protection of human health and the environment at the Site.

K. The Parties recognize, and the Court by entering this Consent Decree finds, that implementation of this Consent Decree will expedite the remedial Work at the Site, will avoid prolonged and complicated litigation between the Parties, and that entry of this Consent Decree is therefore in the public interest.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

This Court has jurisdiction over the subject matter of these actions pursuant to 28 U.S.C. §§ 1311 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Settling Defendant. For purposes of this Consent Decree and the underlying Complaint, Settling Defendant waives all objections and defenses it has to jurisdiction of the Court or to venue in this District. The Complaint states claims against Settling Defendant upon which relief may be granted. Settling Defendant shall not challenge this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

This Consent Decree applies to and is binding upon the undersigned Parties and their agents, heirs, successors and assigns. Any change in ownership or corporate status of Settling Defendant including, but not limited to, any transfer of real or personal property, stock or other assets, shall in no way alter such Settling Defendant's obligations under this Consent Decree. Settling Defendant shall provide a copy of this Consent Decree to all contractors and subcontractors hired to perform the Work and to each person representing Settling Defendant with respect to the Site or the Work. Settling Defendant shall include in all contracts and subcontracts entered into hereunder for performance of the Work provisions stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by

such contracts or subcontracts in compliance with the terms of this Consent Decree. Settling Defendant shall provide a certification to Plaintiff that such provision has been included in its contracts and subcontracts within fifteen (15) days of final execution of contracts for the Remedial Design, Remedial Action and Oversight and Maintenance Work. Settling Defendant shall nevertheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be related by contract to Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Thus, as to acts or omissions of contractors, Settling Defendant shall not assert a defense based upon CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

Unless noted to the contrary, the terms of this Consent Decree shall have the meaning assigned to those terms pursuant to CERCLA. Whenever the terms listed below are used in this Consent Decree and in the Exhibits and Appendices attached hereto, the following definitions shall apply:

A. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.

B. "Consent Decree" shall mean this decree and all appendices and exhibits attached hereto. In the event of

conflict between this decree and any appendix or exhibit, this decree shall control.

C. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the end of the next working day.

D. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

E. "Hazardous Substance" shall mean any substance meeting the definition provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

F. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

G. "Operation and Maintenance" shall mean all activities required to maintain the effectiveness of the Remedial Action as required by the ROD, the Scope of Work and the Final Operation and Maintenance Plan developed by Settling Defendant and approved by EPA pursuant to this Consent Decree, including any additional activities required by Sections VIII and IX hereof.

H. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral.

- I. "Parties" shall mean Plaintiff and Settling Defendant.
- J. "Plaintiff" shall mean the United States.
- K. "Pollutant or Contaminant" shall mean any substance defined in Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).
- L. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site which was signed on September 28, 1990, by the Regional Administrator, EPA Region IV, and all attachments thereto. The ROD is attached hereto as Appendix I and incorporated herein by reference.
- M. "Remedial Action" or "RA" shall mean all property acquisition, excavation, transportation, construction, treatment or other similar activities required by the ROD, the Scope of Work and the Remedial Action Work Plan developed by Settling Defendant and approved by EPA pursuant to this Consent Decree, including any additional activities required by Sections VIII and IX hereof.
- N. "Remedial Design" or "RD" shall mean all studies, investigations or surveys conducted and plans and specifications prepared that are necessary to implement the Remedial Action and Operation and Maintenance activities required by the ROD, the Scope of Work and the Remedial Design Work Plan developed by Settling Defendant and approved by EPA pursuant to this Consent Decree, including any additional activities required by Sections VIII and IX hereof.
- O. "Response Costs" shall mean any and all costs, including but not limited to indirect costs, incurred by Plaintiff pursuant to 42 U.S.C. § 9601 et seq.

P. "Scope of Work" or "SOW" shall mean the scope of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance Work at the Site, as set forth in Appendix 2, attached hereto and incorporated herein by reference.

Q. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral and including one or more paragraphs.

R. "Settling Defendant" shall mean Dow Corning Corporation, a Michigan corporation.

S. "Site" shall mean the Howe Valley Landfill Superfund Site, encompassing approximately 11 acres, located at the end of Tom Duvall Lane, approximately 1.4 miles south of State Road 86 near the Towns of Cecilia and Vertress, Kentucky, as described in the Record of Decision, together with any adjacent real property where Waste Material has migrated; the Site includes the real property depicted on the map attached hereto as Appendix 3 and incorporated herein by reference.

T. "State" shall mean the Commonwealth of Kentucky.

U. "SWDA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq.

V. "United States" shall mean the United States of America, or any agency or department thereof including the United States Department of Justice and the United States Environmental Protection Agency.

W. "Waste Material" shall mean (1) any substance meeting the definition provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any "pollutant" or "contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any "hazardous waste" under Section 1004(5) of SWDA, 42 U.S.C. § 6903(5).

X. "Work" shall mean all activities required by this Consent Decree, including Remedial Design, Remedial Action, and Operation and Maintenance, in accordance with Section VII hereof, and any schedules or plans required to be submitted pursuant thereto, including any additional work required under Sections VII, VIII, IX, X, or XVII hereof.

V. GENERAL PROVISIONS

A. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health, welfare, and the environment from releases or threatened releases of Waste Materials from the Site by the investigation, development, design, and implementation of remedial actions and monitoring programs by Settling Defendant, and to reimburse response costs of Plaintiff.

B. Effect of Settlement

By entering into this Consent Decree, or by taking any action in accordance with it, the Settling Defendant does not admit any of the findings of fact, conclusions of law, determinations or any of the allegations contained in this Consent Decree, nor does Settling Defendant admit liability for

any purpose or admit any issues of law or fact or any responsibility for the alleged release or threat of release of any hazardous substance into the environment. The participation of Settling Defendant in this Consent Decree shall not be admissible against Settling Defendant in any judicial or administrative proceeding, except for any action by EPA to enforce the terms of this Consent Decree, or actions to which EPA is a party and which allege injury based in whole or in part, on acts or omissions of Settling Defendant in connection with performance under this Consent Decree.

C. Commitments by Settling Defendant

1. Settling Defendant shall finance and perform all Work at the Site, in accordance with this Consent Decree, including the SOW and all standards, specifications, and schedules set forth therein or developed thereunder, and in a manner consistent with the ROD. Settling Defendant shall also reimburse Plaintiff for past Response Costs, oversight Response Costs and future Response Costs as provided herein.

2. INTENTIONALLY DELETED.

3. Settling Defendant shall assume any and all liability arising from or relating to its acts or omissions in the performance of the Work or its failure to perform fully or complete the requirements of this Consent Decree.

D. Permits and Approvals

1. Pursuant to Section 121(d) of CERCLA, all activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with applicable or relevant and

appropriate requirements. Plaintiff has determined that the obligations and procedures authorized under this Consent Decree are consistent with the authority of Plaintiff under applicable law to establish appropriate remedial action for the Site.

2. As provided in Section 121(e) of CERCLA and the NCP, no permit shall be required for any portion of the Work conducted entirely on the Site. Where any portion of the Work requires a federal, state, or local permit or approval under CERCLA and the NCP, Settling Defendant shall submit timely applications and requests for any such permits and approvals to the appropriate agency.

3. Settling Defendant shall include in all contracts or subcontracts entered into for Work required under this Consent Decree provisions stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with all applicable laws and regulations. Settling Defendant shall provide a certification to Plaintiff that such provision has been included in its contracts and subcontracts within fifteen (15) days of final execution of contracts for the Remedial Design, Remedial Action and Oversight and Maintenance Work.

4. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

E. State Involvement

Pursuant to Section 121(f) of CERCLA, the State shall be provided a reasonable opportunity for review and comment on each of the following:

1. The Remedial Design; and
2. Other technical data and reports relating to implementation of the Remedial Action including all data and reports required by or contemplated in the SOW.

F. Conveyance of the Site

1. Within thirty (30) days of approval by the Court of this Consent Decree, Settling Defendant shall record a copy of this Consent Decree with the Registry of Deeds, Hardin County, Kentucky or any other office where real property ownership and transfer records are maintained, and shall advise EPA in writing promptly thereafter that the task has been accomplished. Thereafter, each deed, title, or other instrument of conveyance for any property comprising the Site, or any portion thereof, shall contain a notice stating that said property is subject to this Consent Decree and shall reference the recorded location of this Consent Decree and any restrictions applicable to said property hereunder.

2. The Site as described herein may be freely alienated provided that at least sixty (60) days prior to the date of such alienation, the Settling Defendant notifies Plaintiff of such proposed alienation, the name of the grantee, a copy of the proposed contract between the grantor and grantee, and a

description of the Settling Defendant's obligations under this Consent Decree, if any, to be performed by such grantee. In the event of such alienation, all of Settling Defendant's obligations pursuant to this Consent Decree shall continue to be met by Settling Defendant and, subject to approval by Plaintiff, by the grantee.

3. The obligations of Settling Defendant, with respect to the provision of access under Section XI hereof and to the implementation of institutional controls referenced in the Scope of Work, shall run with the land and shall be binding upon Settling Defendant and any and all persons who subsequently acquire any such interest, or portion thereof (hereinafter "Successors-in-Title"). Within ten (10) days after the entry of this Consent Decree by the Court, Settling Defendant shall record with the Registry of Deeds, Hardin County, Kentucky, or any other office where real property ownership and transfer records are maintained, a notice of obligation to provide access related to the Site, as contemplated by this Consent Decree, and covenants related thereto. Settling Defendant shall advise EPA in writing promptly thereafter that this task has been accomplished. Each subsequent deed to any such property shall reference the recorded location of the aforesaid notice and covenants. In addition, Settling Defendant shall, within thirty (30) days after this Consent Decree is entered by this Court, grant easements for the benefit of Plaintiff, satisfactory in form and substance to Plaintiff, for access to such property for

purposes of monitoring and implementing the activities required under and contemplated by this Consent Decree. Promptly thereafter, Settling Defendant shall record such easements in the Registry of Deeds, Hardin County, Kentucky, or any other office where real property ownership and transfer records are maintained. The granting of such easements pursuant to this Paragraph shall not operate to make Plaintiff an owner or operator of the Site for purposes of liability under any environmental statute administered by EPA.

4. Settling Defendant and each respective Successor-in-Title shall, within sixty (60) days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee of such interest and written notice to EPA of the proposed conveyance, the name and address of the grantee, and the date on which notice of this Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendant's obligations under this Consent Decree shall continue to be met by Settling Defendant and, subject to approval by Plaintiff, by the grantee. In no event shall the conveyance of any interest in property comprising the Site, or any portion thereof, release or otherwise affect the obligations of Settling Defendant conveying such interest to comply with this Consent Decree.

VI. REMEDIAL PROJECT MANAGER/PROJECT COORDINATORS

A. Within fifteen (15) calendar days of the lodging of this Consent Decree, Settling Defendant and EPA shall notify each other in writing, respectively, of the name, address and

telephone number of Settling Defendant's designated Project Coordinator and Alternate Project Coordinator, and the EPA designated Project Coordinator and Alternate Project Coordinator. The EPA Project Coordinator shall be a Remedial Project Manager or On-Scene Coordinator ("RPM/OSC"). The Settling Defendant's Project Coordinator shall have primary responsibility for implementation of the Work at the Site. If an initially designated Project Coordinator is changed, the identity of the successor shall be given to the other Parties within five (5) working days before the change is effective.

B. Plaintiff may designate other representatives, including federal and state employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. The EPA Project Coordinator shall have the authority lawfully vested in an RPM/OSC by the National Contingency Plan. This includes the authority to halt, conduct, or direct any work required by this Consent Decree and to take any necessary response action when he or she determines that conditions at the Site may present an imminent and substantial endangerment to public health or welfare or the environment.

C. The absence of the EPA Project Coordinator from the Site shall not be cause for stoppage or delay of work.

VII. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

A. All aspects of the Work to be performed by Settling Defendant pursuant to this Consent Decree shall be under the

direction and supervision of a qualified contractor ("Supervising Contractor") who shall be a qualified professional engineer or geologist with expertise in hazardous site cleanup, the selection of which shall be subject to approval by EPA. Within fifteen (15) days after the lodging of this Consent Decree, Settling Defendant shall submit to EPA in writing the name, title, and qualifications of the proposed Supervising Contractor. EPA shall notify the Settling Defendant of its approval or disapproval of the proposed Supervising Contractor, in writing, within twenty (20) calendar days of EPA's receipt of this submittal by the Settling Defendant.

If EPA disapproves of any Supervising Contractor proposed by Settling Defendant, Settling Defendant shall submit to EPA in writing a list of additional qualified contractors, designating names, titles and qualifications, within fifteen (15) calendar days of receipt of EPA's disapproval of the contractor previously proposed. EPA shall, within twenty (20) calendar days of receipt of the list, provide written notice to Settling Defendant of the contractors that it approves. Settling Defendant shall at its election select any contractor from that list which EPA had approved and shall notify EPA of the name of the contractor selected to be the Supervising Contractor within fifteen (15) calendar days of EPA's designation of approved contractors.

If, at any time thereafter, Settling Defendant propose to change Supervising Contractors, Settling Defendant shall give written notice thereof to EPA and shall obtain written approval

from EPA before the new Supervising Contractor performs any Work under this Consent Decree.

3. Scope of Work

Appendix 2 to this Consent Decree provides a Scope of Work (SOW) for the completion of Remedial Design and Remedial Action and Operation and Maintenance Work at the Site. The Scope of Work is incorporated into and made an enforceable part of this Consent Decree.

C. Remedial Design

1. INTENTIONALLY DELETED.

2. Within thirty (30) days of approval of the Supervising Contractor by EPA, Settling Defendant shall submit for review, modification and approval by EPA, a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan" or "RD Work Plan"). The RD Work Plan shall be developed in accordance with the SOW and be consistent with the ROD, EPA Superfund Remedial Design and Remedial Action Guidance, and any additional guidance documents identified by EPA. As approved by EPA, the RD Work Plan shall be incorporated into and become enforceable under this Consent Decree.

3. The RD Work Plan submittal shall include, but not be limited to, a schedule for submittal of the following project plans: (1) a Sampling and Analysis Plan which includes a Field Sampling and Analysis Plan and a Quality Assurance Project Plan; (2) a Health and Safety Plan which includes a Contingency Plan; (3) a State and Local Permitting Plan; and (4) a Draft Operation and Maintenance Plan. The RD Work Plan shall also include a

schedule for implementation of the RD tasks identified in the SOW, submittal of RD reports, and schedule for the development of a Remedial Action Work Plan, as hereinafter defined.

4. Upon approval of the RD Work Plan by EPA, Settling Defendant shall implement the RD Work Plan in accordance with the schedule therein. Unless otherwise directed by EPA, Settling Defendant shall not commence field activities until approval in writing by EPA of the RD Work Plan.

D. Remedial Action

1. Concurrent with submittal of the Draft Final RD, as defined in the SOW, Settling Defendant shall submit for review, modification, and approval by EPA, a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan" or "RA Work Plan"). The RA Work Plan shall be developed in accordance with the SOW and be consistent with the ROD, EPA Superfund Remedial Action Guidance and any additional guidance documents identified by EPA. As approved by EPA, the RA Work Plan shall be incorporated into and become enforceable under this Consent Decree.

2. The RA Work Plan shall include, but not be limited to, the following: (1) a Sampling and Analysis Plan which includes a Field Sampling and Analysis Plan and a Quality Assurance Project Plan; (2) a Health and Safety Plan which includes a Contingency Plan; (3) a State and Local Permitting Plan contemplating all permits required pursuant to Section V(D)(2) of this Consent Decree; and (4) a Final Operation and Maintenance Plan. The Remedial Action Work Plan shall also

include a schedule for implementation of all Remedial Action tasks identified in the SOW and submittal of RA reports.

3. Upon approval by EPA of the RA Work Plan and all Remedial Action documents, Settling Defendant shall implement the RA Work Plan in accordance with the schedules therein. Unless otherwise directed by EPA, Settling Defendant shall not commence field activities until approval by EPA in writing of the RA Work Plan.

E. Cleanup Goals

The Work performed by Settling Defendant pursuant to this Consent Decree shall achieve the cleanup goals ("Cleanup Goals") detailed in the Record of Decision and the SOW.

F. Warranties

Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, the Remedial Design Work Plan or the Remedial Action Work Plan, constitutes or will constitute a warranty or representation of any kind by Plaintiff that compliance with this Consent Decree will achieve the Cleanup Goals. Settling Defendant further acknowledges and agrees that such compliance shall not preclude Plaintiff from seeking performance of all terms and conditions of this Consent Decree, including the applicable Cleanup Goals.

VIII. U.S. EPA PERIODIC REVIEW TO ASSURE PROTECTION OF HUMAN HEALTH AND ENVIRONMENT

A. To the extent required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, EPA shall

review the Remedial Action at the Site at least every five (5) years after the entry of this Consent Decree to assure that human health and the environment are being protected by the Work implemented pursuant hereto. Prior to Certification of Completion of the Work pursuant to Section XVI hereof, Settling Defendant shall conduct the requisite studies, investigations, or other response actions as determined necessary by EPA, in order to permit EPA to conduct the review of the Site required by Section 121(c) of CERCLA. If, upon such review, EPA determines prior to the Certification of the Completion of the Work pursuant to Section XVI hereof that further response action in accordance with Section 104 or 106 of CERCLA is appropriate at the Site, Settling Defendant shall implement such action. Any dispute regarding the necessity for or scope of such further response action shall be subject to judicial review pursuant to the dispute resolution provisions in Section XXI hereof to the extent permitted by, and in accordance with, Section 113 of CERCLA, 42 U.S.C. § 9613.

B. If required by Sections 113(k)(2) or 117 of CERCLA, Settling Defendant and the public shall be provided with an opportunity to confer with EPA on any additional activities proposed by EPA during the five (5) year review process and to submit written comments for the record during the public comment period. After the period for submission of written comments is closed, the Regional Administrator, EPA Region IV, shall determine in writing if additional activities are appropriate.

IX. ADDITIONAL WORK

A. In the event that EPA or Settling Defendant determines that additional Work, including additional Work identified during the CERCLA Section 121(c) review process described in Section VIII hereof, is necessary to meet the Cleanup Goals or to protect human health or the environment, notification of such additional Work will be provided to the Project Coordinator for the other Party.

B. Any additional Work determined to be necessary by Settling Defendant is subject to approval by EPA and shall be completed by Settling Defendant in accordance with submittals approved by EPA pursuant to Section XIII hereof.

C. Any additional Work determined by EPA to be necessary to meet the Cleanup Goals shall be completed by Settling Defendant in accordance with the submittals approved by EPA pursuant to Section XIII hereof.

D. Unless otherwise stated by EPA in writing, Settling Defendant shall submit for approval by EPA a work plan for the additional Work within thirty (30) days of receipt of notice by EPA that additional Work is necessary. The plan shall conform to the requirements in Section VII hereof as appropriate. Upon approval by EPA pursuant to the procedures set forth in Section XIII hereof, Settling Defendant shall implement the plan for additional Work in accordance with the schedule contained therein.

X. QUALITY ASSURANCE, SAMPLING AND DATA ANALYSIS

A. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures in accordance with EPA's "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plan" (QAMS-005/80) and the "EPA Region IV Engineering Support Branch Standard Operating Procedures and Quality Assurance Manual" (U.S. EPA Region IV, Environmental Services Division, April 1, 1986) and subsequent amendments thereto. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendant shall submit for review, modification and approval by EPA, a Quality Assurance Project Plan ("QAPP") that is consistent with applicable guidelines. Sampling data generated consistent with the QAPP(s) shall be admissible as evidence without objection in any proceeding under Section XXI of this Consent Decree. Settling Defendant shall assure that EPA personnel or authorized representatives are allowed access to any laboratory utilized by Settling Defendant in implementing this Consent Decree.

B. Settling Defendant shall make available to EPA the results of all sampling and/or tests or other data generated by Settling Defendant with respect to the implementation of this Consent Decree, and shall submit these results in monthly progress reports and quarterly progress reports as described in Section XII of this Consent Decree.

C. At the request of EPA, Settling Defendant shall allow split or duplicate samples to be taken by EPA, and/or their authorized representatives, of any samples collected by Settling Defendant pursuant to this Consent Decree. Settling Defendant shall notify EPA not less than fourteen (14) days in advance, or such lesser period of time as agreed in advance by EPA, of any sample collection activity. In addition, EPA shall have the right to take any additional samples that EPA deems necessary.

D. Settling Defendant shall ensure that each laboratory utilized by Settling Defendant for analyses participates in an EPA quality assurance/quality control program equivalent to that which is followed by EPA and which is consistent with EPA document QAMS-005/80. In addition, EPA may require Settling Defendant to submit data packages equivalent to those generated in the EPA Contract Laboratory Program (CLP) and may require laboratory analysis by Settling Defendant of performance samples (blank and/or spike samples) in sufficient number to determine the capabilities of the laboratory.

E. Notwithstanding any provision of this Consent Decree, Plaintiff hereby retains all of its information gathering authorities and rights and inspection authorities and rights under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., as amended by the Hazardous and Solid Waste Amendments of 1984, and any other applicable statute or regulation, including enforcement actions related thereto.

XI. ACCESS

A. From the date of lodging of this Consent Decree with this Court until EPA issues the Certification of Completion of the Work pursuant to Section XVI hereof, and thereafter with regards to Operation and Maintenance, Plaintiff and its representatives, including but without limitation EPA and its contractors, shall have access at all times to the Site and any property to which access is required for the implementation of this Consent Decree, or to conduct actions authorized under CERCLA to the extent access to the Site or such property is controlled by or available to Settling Defendant, for the purposes of conducting any activity authorized by or related to this Consent Decree, including, but not limited to:

1. Monitoring the Work or any other activities taking place on the Site or such property;
2. Verifying any data or information submitted to Plaintiff;
3. Conducting investigations relating to contamination at or near the Site or such property;
4. Obtaining samples;
5. Assessing the need for or planning and implementing additional remedial or response actions at or near the Site or such property;

6. Using a camera, sound recording, or other documentary type of equipment; and

7. Inspecting and copying records, operating logs, contracts, or other documents required to assess Settling Defendant's compliance with this Consent Decree.

3. To the extent that the Site or any other property where Work is to be performed under this Consent Decree is owned or controlled by persons other than Settling Defendant, Settling Defendant shall secure from such persons access for Settling Defendant, as well as for EPA and authorized representatives or agents of EPA, as necessary to effectuate implementation of this Consent Decree. If access is not obtained within thirty (30) days of the date of entry of this Consent Decree by this Court, Settling Defendant shall promptly notify Plaintiff in writing. Plaintiff may thereafter assist Settling Defendant in obtaining access. Settling Defendant shall, in accordance with Section XVIII hereof, reimburse Plaintiff for all costs incurred by it in obtaining access, including but not limited to attorneys' fees and the amount of just compensation and costs incurred by Plaintiff in obtaining access.

C. Notwithstanding any provision of this Consent Decree, Plaintiff retains all of its access authorities and rights under CERCLA, RCRA and any other applicable statute or regulations.

XII. REPORTING REQUIREMENTS

A. Settling Defendant shall submit to EPA and the State written monthly progress reports which: (1) describe the actions

which have been taken toward achieving compliance with this Consent Decree during the previous month; (2) include all results of sampling and tests and all other data received by Settling Defendant during the course of the Work; (3) include all plans, reports, and deliverables required by this Consent Decree completed during the previous month; (4) describe all actions, including data collection and implementation of Work plans, which are scheduled for the next month, and provide other information relating to the progress of the Work as deemed necessary by EPA, including but not limited to, critical path diagrams, Gantt charts and Pert charts; and (5) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Scope of Work and/or RD or RA Work Plans, and a description of efforts made to mitigate those delays or anticipated delays. These monthly progress reports are to be submitted to EPA and the State by the fifth (5th) day of every month following the effective date of this Consent Decree until commencement of Operation and Maintenance pursuant to the Final Operation and Maintenance Plan. Upon commencement of Operation and Maintenance, Settling Defendant shall submit to EPA and the State written quarterly progress reports which: (1) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous quarter; (2) include all results of sampling and tests and all other data received by Settling Defendant during the course of the Work;

(3) include all plans, reports, and deliverables required by this Consent Decree completed during the previous quarter; (4) describe all actions, including data collection and implementation of Work plans, which are scheduled for the next quarter, and provide other information relating to the progress of the Work as deemed necessary by EPA, including but not limited to, critical path diagrams, Gantt charts and Pert charts; and (5) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the RA and/or Final Operation and Maintenance Work Plans, and a description of efforts made to mitigate those delays or anticipated delays. These quarterly progress reports are to be submitted to EPA and the State by the fifth (5th) day of every quarter following the commencement of Operation and Maintenance. Provided, however, that in the event EPA or Settling Defendant determines that additional Work is necessary, as set forth in Sections VIII or IX of this Consent Decree, Settling Defendant shall recommence submittal of written monthly progress reports as set forth herein. Such written monthly reports shall be submitted to EPA and the State by the fifth (5th) day of every month following receipt of notice from EPA or Settling Defendant that additional Work is necessary. In addition, EPA may request periodic briefings by Settling Defendant to discuss the progress of the Work.

B. Upon the occurrence of any event during performance of the Work which, pursuant to Section 103 of CERCLA, requires reporting to the National Response Center, Settling Defendant shall promptly orally notify the EPA Project Coordinator, or in the event of the unavailability of the EPA Project Coordinator, the Superfund Emergency Response and Removal Branch, Region IV, United States Environmental Protection Agency, in addition to the reporting required by Section 103 of CERCLA. Within ten (10) days of the onset of such an event, Settling Defendant shall furnish to Plaintiff a written report setting forth the events which occurred and the measures taken and to be taken in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendant shall submit an additional written report setting forth all actions taken.

C. Settling Defendant shall submit each year, within 30 days of the anniversary of the entry of the Consent Decree, a written summary report to the Court and the Parties setting forth the status of the Work, which summary report shall at a minimum include a statement of major milestones accomplished in the preceding year, a statement of tasks remaining to be accomplished, and a schedule for implementation of the remaining Work.

D. All reports and other documents submitted by Settling Defendant to Plaintiff, other than the monthly progress reports and quarterly progress reports described in Paragraph A of this Section, which purport to document Settling Defendant's

compliance with this Consent Decree shall be signed by an authorized representative of Settling Defendant.

XIII. SUBMISSIONS REQUIRING AGENCY APPROVAL

A. Upon receipt of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA shall either: (1) approve the submission, or (2) disapprove the submission, notifying Settling Defendant of deficiencies therein. If a submission is disapproved, EPA shall either (1) notify Settling Defendant that EPA will modify the submission to correct the deficiencies, or (2) direct Settling Defendant to modify the submission to correct the deficiencies.

B. In the event of EPA approval or modification, Settling Defendant shall proceed to take any action required by the plan, report, or other item as approved or modified.

C. Upon receipt from EPA of a notice of disapproval directing modification, Settling Defendant shall, within thirty (30) days thereof, correct the deficiencies and resubmit the plan, report, or other item to EPA for approval. Notwithstanding a notice of disapproval, Settling Defendant shall proceed to take any action required by or described in any nondeficient portion of the submission.

D. If, upon resubmission, the plan, report, or item is not approved by EPA, Settling Defendant shall be deemed to be in violation of this Consent Decree and stipulated penalties shall begin to accrue pursuant to Section XXII hereof.

E. The provisions of this Consent Decree shall govern all proceedings regarding the Work performed pursuant to this Consent Decree. In the event of any inconsistency between this Consent Decree and any required deliverable submitted by Settling Defendant, the inconsistency will be resolved in favor of this Consent Decree.

XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

A. Settling Defendant shall demonstrate its ability to complete the Work and to pay all claims that arise from the performance of the Work by obtaining, and presenting to EPA for approval within thirty (30) days of the entry of this Consent Decree, one of the following: (1) performance bond; (2) letters of credit; (3) guarantee by a third party; or (4) internal financial information sufficient to demonstrate to Plaintiff's satisfaction that Settling Defendant has sufficient net assets to complete the Work. Plaintiff will have ninety (90) days from the receipt of the information or other assurance to make a determination of the adequacy of the financial assurance and to communicate that determination to Settling Defendant. If Settling Defendant seeks to demonstrate ability to complete the Work by means of internal financial information, it shall resubmit such information annually on the anniversary of the effective date of this Consent Decree. In the event that Plaintiff determines that such internal financial information is inadequate, Settling Defendant shall, within thirty (30) days of receipt of written notice of Plaintiff's determination,

obtain and present to EPA for approval one of the other three forms of financial assurance listed above. Settling Defendant's lack of ability to demonstrate financial ability to complete the Work shall not excuse performance of this Consent Decree or any term hereof.

XV. INTENTIONALLY DELETED

XVI. CERTIFICATION OF COMPLETION

A. Within ninety (90) days after Settling Defendant concludes that the Work has been fully performed, Settling Defendant shall so notify Plaintiff and EPA by submitting a certified written report by a registered professional engineer or geologist licensed to practice in the State of Kentucky stating that all such activities have been completed in full satisfaction of the requirements of this Consent Decree. If EPA determines that the Work or any portion thereof has not been completed in accordance with this Consent Decree, EPA shall notify Settling Defendant in writing of the activities that must be done to complete the Work and shall set forth in the notice a schedule for performance of the activities. Settling Defendant shall perform all Work described in the notice in accordance with the specifications and schedules established therein. Any dispute under this Paragraph is subject to the Dispute Resolution procedures set forth in Section XXI of this Consent Decree.

3. If EPA concludes, following the initial or any subsequent notification of completion by Settling Defendant,

that the Work has been fully performed in accordance with this Consent Decree, EPA shall so certify in writing to Settling Defendant. This certification shall constitute the "Certification of Completion of the Work" for purposes of this Consent Decree, including Section XXIII (Covenants Not to Sue by Plaintiff).

XVII. ENDANGERMENT AND FUTURE RESPONSE

A. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of a hazardous substance, pollutant or contaminant, or which may present an imminent and substantial endangerment to public health or welfare or the environment, Settling Defendant shall immediately take all appropriate action to prevent, abate or minimize such release or endangerment, and shall immediately notify the EPA Project Coordinator, or, if the EPA Project Coordinator is unavailable, the EPA Superfund Emergency Response and Removal Branch, Region IV. Settling Defendant shall take such action in accordance with all applicable provisions of the Health and Safety/Contingency Plan developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and the EPA takes such action instead, Settling Defendant shall reimburse all Response Costs not inconsistent with the NCP. Payment of such Response Costs shall be made in the manner described in Section XVIII, Paragraph B hereof, as applicable, within thirty (30) days of Settling Defendant's receipt of demand for payment.

3. Nothing in the preceding Paragraph shall be deemed to limit the power and authority of the United States or this Court to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

XVIII. REIMBURSEMENT OF RESPONSE COSTS

A. Within fifteen (15) days of the entry of this Consent Decree, Settling Defendant shall pay to EPA \$58,078.37 in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," and referencing "CERCLA Number TJB04D6N8 and DOJ Case Number 90-11-3-671" in reimbursement of some Response Costs incurred by Plaintiff prior to the entry of this Consent Decree for removal or remedial actions relating to the Site. The certified check(s) shall be forwarded to the United States Environmental Protection Agency, Region IV, ATTENTION: Superfund Accounting, P.O. Box 100142, Atlanta, Georgia 30384. Copies of the check(s) and any transmittal letter(s) shall be sent to the United States Department of Justice and EPA pursuant to the notice provisions of Section XXVII hereof.

B. Settling Defendant shall reimburse Plaintiff for all Response Costs including oversight costs incurred by Plaintiff in connection with the Work or this Consent Decree. Response Costs may include, but are not limited to, costs incurred by Plaintiff in overseeing Settling Defendant's implementation of

of the requirements of this Consent Decree and activities performed by Plaintiff as part of the RD, the RA and community relations, including any costs incurred while obtaining access. Response Costs shall include all direct and indirect costs, including, but not limited to, time and travel costs of Plaintiff's personnel and associated indirect costs, contractor costs, cooperative agreement costs, compliance monitoring, including the collection and analysis of split samples, inspection of RD and RA activities, site visits, discussions regarding disputes that may arise as a result of this Consent Decree, review and approval or disapproval of reports or other submittals, and costs of redoing any of Settling Defendant's tasks. Any necessary summaries, including but not limited to EPA's certified Agency Financial Management System summary data (SPUR Reports), or such other summary or accounting as certified by EPA, shall serve as basis for payment demands. Plaintiff shall send Settling Defendant a demand for payment of such costs on an annual basis, with the demand to be made as soon as practicable after the anniversary date of the entry of this Consent Decree. Payments shall be made in the manner described in Paragraphs A and B of this Section, as applicable, within thirty (30) days of Settling Defendant's receipt of each demand for payment.

C. Copies of checks paid pursuant to Paragraph B of this Section, and any accompanying transmittal letters, shall be sent to Plaintiff as provided in Section XXVII hereof. Additionally,

copies of check(s) paid pursuant to Paragraphs A and B, and accompanying transmittal letter(s), shall be sent to the office of the United States Attorney, Western District of Kentucky.

D. Settling Defendant may contest payment of any oversight Response Cost or future Response Cost under Paragraph B of this Section if it determines that EPA has made an accounting error or if it alleges that a cost item that is included represents costs incurred for efforts undertaken in a manner that was inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the accounting and must be sent to Plaintiff pursuant to Section XXVII hereof. Any such objection shall specifically identify the contested oversight Response Cost or future Response Cost and the basis for the objection. In the event of an objection, the Settling Defendant shall within the thirty (30) day period remit a certified or cashiers check for an amount covering any non-contested oversight Response Costs or future Response Costs to Plaintiff in the manner described in Paragraphs A and C of this Section. Disputes regarding contested amounts shall be resolved pursuant to the dispute resolution procedures in Section XXI hereof. If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Settling Defendant shall remit to Plaintiff funds equivalent to the amount of the contested oversight Response Costs or future Response Costs, plus interest on the unpaid amounts.

3. In the event that the payments required by Paragraphs A and B are not timely made, Settling Defendant shall pay interest on the unpaid balance at the rate established by the United States Department of the Treasury under 31 U.S.C. § 3717. Settling Defendant shall further pay (i) a handling charge of one (1) percent, to be assessed at the end of each thirty(30)-day late period, and (ii) a six (6) percent per annum late charge, to be assessed if Settling Defendant has not paid in full within ninety (90) days after the payment is due. Payments made under this paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section.

XIX. INDEMNIFICATION AND INSURANCE

A. Plaintiff does not assume any liability for entering into this Consent Decree or for designating Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify and save and hold harmless Plaintiff, its officials, agents, employees, contractors, or representatives from any and all claims or causes of action arising from or on account of acts or omissions of Settling Defendant, its officers, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Plaintiff shall not be held out as a party to any contract entered into by or on behalf of

Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither Settling Defendant nor any such contractor shall be considered an agent of Plaintiff.

B. Settling Defendant waives, and shall indemnify and hold harmless Plaintiff with respect to, any and all claims for damages or reimbursement from Plaintiff or for set-off of any payments made or to be made to Plaintiff, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of any work on or relating to the Site, including claims due to construction delays.

C. No later than ten (10) days prior to commencing any Work, Settling Defendant shall secure, and shall maintain until the fifth (5th) anniversary of the termination of this Consent Decree, comprehensive general liability and automobile insurance with limits of five (5) million dollars, combined single limit. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of workmen's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or

subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XX. FORCE MAJEURE

A. "Force Majeure" is defined for the purposes of this Consent Decree as an event arising from causes entirely beyond the control of Settling Defendant and of any entity controlled by Settling Defendant, including its contractors and subcontractors, which could not have been overcome by due diligence and which delays or prevents the performance of any obligation under this Consent Decree. Examples of events which may constitute force majeure events include extraordinary weather events, natural disasters, and national emergencies. Examples of events that are not force majeure events include, but are not limited to, normal inclement weather, increased costs or expenses of the Work to be performed under this Consent Decree, the financial difficulty of Settling Defendant to perform such Work, the failure of Settling Defendant to satisfy its obligations under this Consent Decree, acts or omissions not otherwise force majeure attributable to Settling Defendant's contractors or representatives, and the failure of Settling Defendant or Settling Defendant's contractors or representatives to make complete and timely application for any required

complete and timely application for any required approval or permit.

3. When circumstances occur which may delay or prevent the completion of any phase of the Work or access to the Site or to any property on which part of the Work is to be performed, whether or not caused by a force majeure event, Settling Defendant shall notify the EPA Project Coordinator orally of the circumstances within two (2) Days of when Settling Defendant first knew or should have known that the circumstances might cause delay. If the EPA Project Coordinator is unavailable, Settling Defendant shall notify the designated alternate or the Director of the Waste Management Division, EPA Region IV. Within five (5) working days after Settling Defendant first became aware of such circumstances, Settling Defendant shall supply to Plaintiff in writing: (1) the reasons for the delay; (2) the anticipated duration of the delay; (3) all actions taken or to be taken to prevent or minimize the delay; (4) a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and (5) a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Settling Defendant shall exercise best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure.

C. If EPA agrees that a delay is or was caused by a force majeure event, the time for performance of the obligations under this Consent Decree that are directly affected by the force majeure event shall be extended by agreement of the Parties, pursuant to Section XXX hereof, for a period of time not to exceed the actual duration of the delay caused by the force majeure event. An extension of the time for performance of the obligation directly affected by the force majeure event shall not necessarily justify an extension of time for performance of any subsequent obligation.

D. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event or does not agree with Settling Defendant on the length of the extension, the issue shall be subject to the dispute resolution procedures set forth in Section XXI of this Consent Decree. In any such proceeding, to qualify for a force majeure defense, Settling Defendant shall have the burden of proving by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraph B of this Section. Should Settling Defendant carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree.

XXI. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree and shall apply to all provisions of this Consent Decree.

B. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for negotiations shall not ordinarily exceed thirty (30) days from the time the dispute arises, unless it is extended by agreement between Plaintiff and Settling Defendant. The dispute shall be considered to have arisen when one party notifies the other party in writing that there is a dispute. The period for informal negotiations shall end when EPA provides a written Statement of Position on the disputed matter to the Settling Defendant.

C. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the Statement of Position advanced by EPA shall be considered binding unless, within five (5) days after the receipt of the Statement of Position, Settling Defendant invokes the dispute resolution procedures of this Section by giving written notice to the United States Department of Justice and EPA. After

receiving such notice from Settling Defendant, EPA shall notify Settling Defendant whether the dispute is to be resolved on the administrative record under Paragraph D of this Section. At its nonreviewable option, EPA may determine that any dispute which relates to the selection, extent, or adequacy of any aspect of any response actions shall be resolved on an administrative record. For the purposes of this Paragraph, the adequacy of any response action includes: (1) the adequacy or appropriateness of plans, procedures to implement plans or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of response actions performed pursuant to this Consent Decree.

D. If EPA elects pursuant to Paragraph C of this Section to resolve a dispute on an administrative record, the following procedures shall apply:

1. The administrative record for the purposes of this Section shall include the written notification of the dispute, all Statements of Position, and any other materials submitted by the Parties pursuant to Paragraph C of this Section in support of their positions.

2. Within ten (10) days after receiving notice from EPA that a dispute is subject to resolution on an administrative record, Settling Defendant shall serve on EPA a written Statement of Position on the matter in dispute, including any factual data, analysis or opinion supporting that position and all supporting documentation relied upon. Within ten (10) days

after receipt of Settling Defendant's Statement of Position, EPA may serve on Settling Defendant a supplemental Statement of Position, including supporting documentation, in response to the Settling Defendant's Statement of Position. No further submittals by Settling Defendant shall be allowed except by agreement of the Parties. In the event that these ten (10) day periods for exchange of Statements of Position may delay the Work, the ten (10) day periods may be shortened by EPA upon notice to all Parties to the dispute.

3. Upon review of the administrative record, the Director of the Waste Management Division, EPA Region IV, shall issue a final decision resolving the dispute.

4. Any decision by EPA pursuant to the preceding Paragraph shall be reviewable by this Court, provided that a Notice of Judicial Appeal is filed within ten (10) days from receipt of EPA's decision.

5. If, pursuant to Paragraph C of this Section, EPA determines that a dispute should not be reviewed on an administrative record, then the position on the dispute advanced by EPA in its initial Statement of Position shall be considered binding on all Parties unless, within ten (10) days after receipt of EPA's determination that review will not be on an administrative record, Settling Defendant files a petition with this Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree.

F. In proceedings on any dispute relating to the selection, extent, or adequacy of any aspect of the Work, Settling Defendant shall have the burden of demonstrating that the position advanced by EPA is arbitrary and capricious or otherwise not in accordance with law. With respect to disputes for which an administrative record is developed pursuant to Paragraph D of this Section, judicial review of EPA's decision shall be confined to the administrative record.

G. Nothing herein shall prevent Plaintiff from arguing that the Court should apply the arbitrary and capricious standard of review to disputes under this Consent Decree. In proceedings on any dispute, Settling Defendant shall bear the burden of proof.

XXII. STIPULATED PENALTIES

A. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraph H of this Section to Plaintiff for violations of this Consent Decree. "Compliance" by Settling Defendant shall include completion of any activity under this Consent Decree or any plan approved under this Consent Decree in an acceptable manner and within the specified time schedules established by and approved under this Consent Decree.

B. All penalties shall begin to accrue on the day that complete performance is due or the day that a violation occurs, whichever comes first, and continue to accrue through the final day of correction of the noncompliance. Nothing herein shall

prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

C. Following Plaintiff's determination that Settling Defendant has failed to comply with the requirements of this Consent Decree, Plaintiff shall give Settling Defendant written notification of the same and describe the noncompliance. Said notice shall also indicate the amount of penalties due.

D. All penalties owed to Plaintiff under this Section shall be payable within thirty (30) days of receipt of the notification of noncompliance, unless Settling Defendant invokes the dispute resolution procedures under Section XXI of this Consent Decree. Penalties shall accrue from the date of noncompliance regardless of whether Plaintiff has notified Settling Defendant of a violation. Settling Defendant shall pay interest on the unpaid balance, which shall begin to accrue at the end of the thirty (30) day period at the rate established by the United States Department of Treasury under 31 U.S.C. § 3717. Settling Defendant shall further pay a handling charge of one (1) percent, to be assessed at the end of each thirty (30) day late period, and a six (6) percent per annum late charge, to be assessed if the penalty is not paid in full within ninety (90) days after it is due. All payments under this Section shall be paid by certified check made payable to "EPA Hazardous Substance Superfund," shall be mailed to Superfund Accounting, P.O. Box 100142, Atlanta, Georgia 30384, and shall reference

"CERCLA Number TJB04D6N8 and DOJ Case Number 90-11-3-671".

Copies of the transmittal letters shall be mailed to the United States Department of Justice and EPA at the addresses listed in Section XXVII hereof.

E. Neither the filing of a petition to resolve a dispute nor the payment of penalties shall alter in any way Settling Defendant's obligation to complete the performance required hereunder.

F. Settling Defendant may dispute Plaintiff's right to the stated amount of penalties by invoking the dispute resolution procedures under Section XXI hereof. Penalties shall accrue but need not be paid during the dispute resolution period. If a disputed matter is submitted to this Court, the period of dispute shall end upon the rendering of a decision by this Court regardless of whether any party appeals such decision. If Settling Defendant does not prevail upon resolution of such disputed matter, Plaintiff has the right to collect all penalties which accrued prior to and during the period of dispute. If Settling Defendant prevails upon resolution, no penalties shall be paid.

G. If Settling Defendant fails to pay stipulated penalties, Plaintiff may institute proceedings to collect the penalties, as well as late charges and interest. However, nothing in this Section shall be construed as prohibiting, altering, or in any way limiting the ability of Plaintiff to

seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based.

H. The following stipulated penalties shall be payable per violation per day to Plaintiff for any noncompliance identified in Paragraph A above:

<u>Penalty Per Violation</u>	<u>Period of Noncompliance per Day</u>
\$ 5,000	1st thru 14th day
\$10,000	15th thru 30th day
\$15,000	31st day and beyond

I. No payments made under this Section shall be tax deductible for federal tax purposes.

XXIII. COVENANTS NOT TO SUE BY PLAINTIFF

A. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of the Consent Decree, Plaintiff covenants not to sue or to take administrative action against Settling Defendant for Covered Matters, as hereinbelow described, with respect to all such liability, except for any future liability relating to additional response activities at the Site not identified in the ROD or the SOW and except as specifically provided in Paragraphs B and C of this Section. These covenants not to sue shall take effect upon the receipt by EPA of the payments required by this Consent Decree under Section XVIII. With respect to any such future liability, these covenants not to sue shall take effect

upon EPA issuance of the Certification of Completion of the Work pursuant to Section XVI hereof. These covenants not to sue are conditioned upon complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend to Settling Defendant and do not extend to any other person.

3. Except as provided in Paragraphs C through E, Covered Matters shall include any and all civil liability to Plaintiff for causes of action arising under Sections 106 and 107(a) of CERCLA for performance of the Work and for recovery of Response Costs incurred by Plaintiff in connection with the Site prior to the lodging of this Consent Decree with this Court.

C. Pre-Certification reservations

Notwithstanding any other provision of this Consent Decree, Plaintiff reserves the right to institute proceedings in this action or in a new action or to issue an administrative order seeking to compel Settling Defendant (1) to perform additional response actions relating to the Site, or (2) to reimburse Plaintiff for Response Costs if, prior to EPA issuance of the Certification of Completion of the Work pursuant to Section XVI hereof:

- (i) conditions at the Site, previously unknown to Plaintiff, are discovered after the entry of this Consent Decree, or
- (ii) information is received, in whole or in part, after the entry of this Consent Decree, and

- (iii) the EPA Administrator or his/her delegate finds, based on these previously unknown conditions or this information together with any other relevant information, that the Work is not protective of human health and the environment.

D. Post-Certification reservations

Notwithstanding any other provision of this Consent Decree, Plaintiff reserves the right to institute proceedings in this action or in a new action or to issue an administrative order seeking to compel Settling Defendant (1) to perform additional response actions relating to the Site or (2) to reimburse Plaintiff for Response Costs if, subsequent to Certification of Completion of the Work:

- (i) conditions at the Site, previously unknown to Plaintiff, are discovered after the Certification of Completion of the Work, or
- (ii) information is received, in whole or in part, after the Certification of Completion of the Work, and
- (iii) the EPA Administrator or his/her delegate finds, based on these previously unknown conditions or this information together with other relevant information, that the Work is not protective of human health and the environment.

The above-mentioned reservation of right includes the right to institute proceedings in this action or in a new action to seek reimbursement of costs incurred as a result of actions undertaken pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c).

E. For purposes of Paragraph C, the information received and the conditions known to Plaintiff shall include only that

information and those conditions set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph D, the information received by and the conditions known to Plaintiff shall include only that information and those conditions set forth in the Record of Decision and any information received by Plaintiff pursuant to the requirements of this Consent Decree.

F. General reservations of rights

The covenants not to sue set forth above do not pertain to any matters other than those expressly specified to be Covered Matters. Plaintiff reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to:

1. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
2. liability arising from the past, present, or future disposal, release, or threat of release of hazardous substances outside of the Site and not attributable to the Site;
3. liability for the disposal of any hazardous substances taken from the Site;
4. liability for damages for injury to, destruction of, or loss of natural resources;
5. any matter as to which Plaintiff is owed indemnification under Section XVIII hereof;
6. criminal liability;

7. liability for violations of federal law which occur during implementation of the Remedial Action;

8. oversight Response Costs and future Response Costs, if incurred and not reimbursed to the United States pursuant to Section XVIII hereof; and

9. previously incurred Response Costs above the amounts reimbursed pursuant to Paragraph XVIII hereof.

G. Notwithstanding any other provision of this Consent Decree, Plaintiff retains all authority and reserves all rights to take any and all response actions authorized by law.

H. Settling Defendant reserves all rights it may have to defend against any claims or actions brought by Plaintiff pursuant to Paragraph F of this Section or otherwise.

XXIV. COVENANTS BY SETTLING DEFENDANT

Settling Defendant hereby covenants not to sue Plaintiff for any claims related to or arising from any response action taken with respect to the Site or this Consent Decree, including any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established pursuant to Section 221 of CERCLA, 42 U.S.C. § 9631. However, the Settling Defendant reserves, and this Consent Decree is without prejudice to, actions against the United States based on negligent actions taken directly by the United States (not including oversight or approval of the Settling Defendant's plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute

other than CERCLA. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.25(d).

XXV. ACCESS TO INFORMATION

A. Settling Defendant shall provide to EPA, upon request, all documents and information within its possession and/or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including sampling, and analysis records, chain of custody records, manifests, shipping logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work undertaken pursuant to this Consent Decree. Settling Defendant shall also make available to EPA or its agents or representatives knowledge of relevant facts concerning the performance of the Work and such documents and information as necessary for the purposes of investigation, information gathering, or testimony.

B. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Such an assertion will be adequately substantiated when the assertion is made. Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R.

Part 2, Subpart B. If no claim of confidentiality accompanies specific documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA and 40 C.F.R. § 2.203(b), the public may be given access to such documents or information without further notice to Settling Defendant.

C. No claim of confidentiality shall be made with respect to any sampling or analytical data or any other documents or information evidencing conditions at or around the Site.

D. The Parties waive any objection to the admissibility into evidence (without waiving any objection as to weight) of the results of any analyses of sampling conducted by or for them at the Site or of other data gathered pursuant to this Consent Decree that has been verified by the quality assurance/quality control procedures established pursuant to Section X hereof.

XXVI. RETENTION OF RECORDS

A. Until EPA issuance of the Certification of Completion of the Work pursuant to Section XVI hereof and termination of this Consent Decree, Settling Defendant shall preserve, and shall instruct its contractors and agents to preserve, all documents, records, and information of whatever kind, nature, or description relating to the performance of the Work.

B. For six (6) years after EPA issuance of the Certification of Completion of the Work pursuant to Section XVI hereof, Settling Defendant shall preserve and retain all

records and documents now or hereafter in its possession or control that relate in any manner to the Site. After this document retention period, Settling Defendant shall notify Plaintiff at least ninety (90) calendar days prior to the destruction of any such records or documents, and upon request by Plaintiff, Settling Defendant shall relinquish custody of the records or documents to EPA. Additionally, if Plaintiff requests that all documents be preserved for a longer period of time, Settling Defendant will comply with the request.

XXVII. NOTICES AND SUBMISSIONS

A. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals and the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified in this Section shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to Plaintiff, EPA and Settling Defendant, respectively.

B. Unless noted otherwise, where written notice is required to be given or a report or other document is required to be submitted, such notice shall be sent to:

The United States Environmental Protection Agency

Mary Jo Penick
Remedial Project Manager
Waste Management Division
U. S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Copies of checks and payment transmittal letters:

Accounts Receivable Specialist
Financial Management Office
U. S. Environmental Protection Agency, Region IV
345 Court and Street, N.E.
Atlanta, Georgia 30365

The Settling Defendant

Dow Corning Corporation
Edward C. Ovsenick
Administrative Law CO1242
Midland, Michigan 48686-0994

For Informational Purposes Only

The Department of Justice
Chief, Environmental Enforcement Section
Land and Natural Resources Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
RE: DOJ #90-11-3-671

and

Brooke F. Dickerson
Assistant Regional Counsel
United States Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

The State of Kentucky

Carl Millanti
Natural Resources and Environmental Protection
Cabinet
Frankfort Office Park
18 Reilly Road
Frankfort, KY 40601

XXVIII. EFFECTIVE AND TERMINATION DATES

A. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

B. Upon notice by EPA to the Court that EPA has issued the Certification of Completion of the Work pursuant to Section XVI

hereof and that Settling Defendant has satisfied its obligations under Sections XVIII (Response Costs) and XXII (Stipulated Penalties) hereof, this Consent Decree shall terminate upon the motion of any Party. Termination of this Consent Decree shall not affect the covenants not to sue (provided in Sections XXIII and XXIV above), including all reservations pertaining to those covenants, and shall not affect any continuing obligation of Settling Defendant under Sections VIII, XI, XII, XV, XIX, XXV and XXVI hereof.

XXIX. RETENTION OF JURISDICTION

This Court will retain jurisdiction for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXI hereof.

XXX. MODIFICATION

No material modifications shall be made to this Consent Decree without written notification to and written approval of the Parties and the Court except as provided in Section XIII hereof. The notification required by this Section shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Modifications that do not materially alter the requirements of this Consent Decree, such as minor schedule changes, may be made upon the written consent of all Parties, which consent shall be

filed with this Court. Nothing in this Section shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

XXXI. COMMUNITY RELATIONS

Settling Defendant shall cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

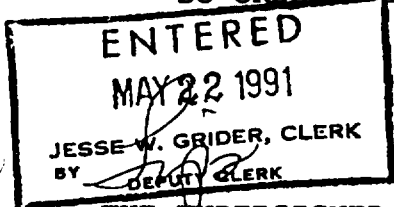
This Consent Decree shall be lodged with this Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. Plaintiff reserves the right to withdraw or withhold its consent hereto if the comments regarding this Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant hereby grants its consent to the entry of this Consent Decree by the Court without further notice.

XXXIII. SIGNATORIES

A. Each undersigned representative of a party to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

B. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure, including service of a summons, and any applicable local rules of this Court.

SO ORDERED THIS 22nd DAY OF May, 1991.



[Signature]
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree relating to the Howe Valley Landfill Superfund Site.

Date: 3/25/91

cc: Counsel

FOR THE UNITED STATES OF AMERICA

[Signature]

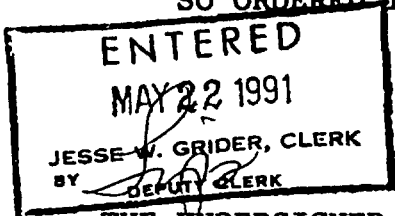
Richard B. Stewart
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Signature]

Lawrence W. Puckett
Environmental Enforcement Section
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

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[Signature]
United States District Judge

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Date: 3/25/91

cc: Counsel

FOR THE UNITED STATES OF AMERICA

[Signature]
Richard B. Stewart
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Signature]
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SO ORDERED THIS _____ DAY OF _____, 1991.

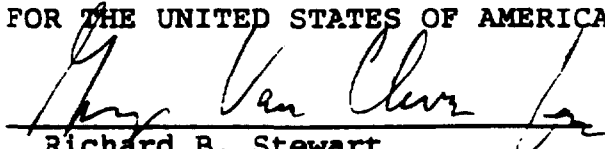
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree relating to the Howe Valley Landfill Superfund Site.

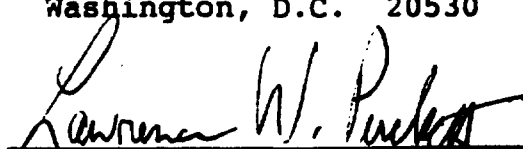
Date: _____

3/25/91

FOR THE UNITED STATES OF AMERICA


Richard B. Stewart
Assistant Attorney General
Land and Natural Resources
Division

U.S. Department of Justice
Washington, D.C. 20530


Lawrence W. Puckett
Environmental Enforcement Section
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 2-23-91

Dwight M. Blum

Greer C. Tidwell
Regional Administrator
Region IV
U.S. Environmental Protection
Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Brooke F. Dickerson

Brooke F. Dickerson
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

FOR DOW CORNING CORPORATION:

Date: February 1, 1991

James R. Jenkins

Name: James R. Jenkins
Title: V.P., Secretary & General Counsel

Agent Authorized to Accept Service on Behalf of DOW CORNING
CORPORATION:

Name: D.T. Corporation
Title: _____
Address: 615 Griswold Street
Detroit, Michigan 48226